

SERVED: October 13, 1994

NTSB Order No. EA-4259

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 30th day of September, 1994

DAVID R. HINSON,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket SE-9676
	)	
DAVID R. BRODERDORF,	)	
	)	
Respondent.	)	
	)	

**OPINION AND ORDER ON REMAND**

On April 6, 1993, the United States Court for the District of Columbia Circuit remanded this case to the Board for "more particular fact-findings and clearer reasoning." (Mem. at 1). The parties have availed themselves of the opportunity to file additional submissions after remand.

NTSB Order EA-3349, served July 19, 1991 (reconsideration denied, NTSB Order EA-3451, served December 19, 1991), granted the Administrator's appeal and reversed the law judge's decision

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that respondent did not violate specified sections of 14 C.F.R. Part 135 by operating flights for compensation or hire after his company's Part 135 authority had been revoked.<sup>1</sup>

The complaint (order of revocation) alleged, among other things, that respondent had operated over two hundred cargo and passenger-carrying flights on behalf of Buffalo Express Airline, Inc. (BEA), for compensation or hire when BEA's Part 135 operating certificate had been revoked by the Federal Aviation Administration (FAA).<sup>2</sup> The law judge's reversal of the Administrator's order was predicated on her determination that Air Maryland, Inc. (AMI), not respondent, exercised control over all flights.

In Orders EA-3349 and EA-3451, the Board focused on a handful of flights that AMI did not control and as to which, therefore, the rationale relied on by the law judge to exonerate respondent could not apply.<sup>3</sup> For a number of reasons articulated by the Board, it was concluded that respondent exercised operational control over these flights. For example, there were three flights to and from Canada and neither AMI nor its principal, Robert Cadwalader, had authority to operate in Canada. Respondent suggested that the Canadian flights were arranged for

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<sup>1</sup>NTSB Order EA-3499, served February 27, 1992, denied respondent's request for a stay pending judicial review.

<sup>2</sup>Respondent owned BEA.

<sup>3</sup>These flights consisted of two groups--flights to Canada as well as flights after AMI unilaterally terminated its operating agreement with BEA.

privately between the passengers and the owners of the aircraft.<sup>4</sup>

The Board noted that there was no evidence that the owners possessed Part 135 authority and relied on the fact that the aircraft has been leased by the owners to BEA and the flights were conducted by pilots associated with BEA. There were also several flights after AMI unilaterally terminated its operating agreement with BEA, and respondent's wife testified she or her husband arranged for these flights through the owners of the aircraft.<sup>5</sup> In further support of its conclusion that these were Part 135 flights controlled by respondent, the Board noted that the bills were generated by and payment made to BEA and that the customer for which most of these flights were flown was one of BEA's regular customers and the amount charged for such flights was precisely the amount previously charged this customer by BEA for admittedly Part 135 operations.

The Court found that the Board's view that several flights to Canada could not have been conducted by AMI because it lacked authority to operate in Canada was insufficient to establish that respondent operated the flights since respondent also lacked authority to operate in Canada: "Obviously lack of Part 135 authority proves nothing, for even absent such authority, AMI, BEA, Cadwalader, Broderdorf, some other party, or some combination thereof could have had operational control over the

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<sup>4</sup>First Buffalo Leasing owned the aircraft which it leased to BEA. Respondent was one of five 20% stockholders of First Buffalo Leasing.

<sup>5</sup>Respondent had an ownership interest in the aircraft.

flights to Canada." (Mem. at 2). The Court further noted: "In the absence of a more sufficient explanation why any flight authorized by BEA necessarily was under the operational control of David Broderdorf, the seven unauthorized flights on which the Board relies provide questionable support for the Board's revocation." (Mem. at 3). The Court acknowledged that respondent appeared to have been the driving force behind BEA's operations, but was troubled that the Board deemed respondent the alter ego of BEA throughout the period during which the allegedly illegal flights were being conducted without additional explanation of why people other than respondent might not have controlled the unauthorized flights.

The Administrator had to prove by a preponderance of the evidence that respondent operated the flights for compensation or hire. The law judge's rationale for finding that respondent controlled none of the flights cited in the complaint-- because AMI operated the flights--could not cover the flights we cited that were indisputably not operated by AMI. We recognize that our unchallenged determination that AMI did not control these flights would not in and of itself establish that respondent operated these flights, and we believed that our reasoning, as summarized above, was sufficient to support the allegation that respondent had operated them. Inasmuch as the Court found these reasons wanting<sup>6</sup> and we have nothing to add to our previous

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<sup>6</sup>The Court suggested that there were other possible contenders for having controlled these flights, most notably Mr. Peter Horn, who respondent hired to be President of BEA after the

explanation of the core of our reasoning, the Board is constrained to reverse its findings that respondent operated the flights the Board focused on in Orders EA-3349 and 3451.

As to the remaining flights that were allegedly operated by respondent for compensation or hire, the Administrator has not persuaded us that the law judge's findings which were based largely on her assessment of the credibility of testimony must be reversed. The law judge listened to the testimony, compared the operation before and after the revocation of BEA's Part 135 certificate, and concluded that respondent did not continue to exert operational control over the flights after the revocation of BEA's certificate. We note in this connection that the law judge approached this case with outspoken skepticism towards respondent's position--in response to his counsel's opening statement, the law judge volunteered that "I tell you it smells to high heaven" (Tr. 30)<sup>7</sup> but she nevertheless upon completion of

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revocation of its certificate. It was Mr. Horn's undisputed testimony that he was hired to handle the recertification of BEA and that he would not exercise operational control over BEA unless and until it requalified for certification, which it had not succeeded in doing by the time of the hearing in this case.

<sup>7</sup>In her oral, initial decision, the law judge reiterated her preliminary suspicions:

"When this case was first considered by me, when it was first assigned to me and I read the motions that came and I read--I thought ha, ha, ha. We've got another one of these guys trying to pull the wool over everybody's eyes. Well, by god, he's not going to do it with me, I said.

So I came in here and listened with both ears. But lo and behold, I am satisfied that this was a bona fide operation, at least on the part of Mr. Broderdorf" Tr.

the presentation of evidence found for respondent.

The Administrator has catalogued and described the evidence that runs counter to the law judge's findings, and there is concrete evidence for the Administrator to rely on including corporate records of the firm that respondent was the sole shareholder.<sup>8</sup> It is a fundamental responsibility of the law judge to resolve clashing testimony and other conflicts in evidence. The law judge was aware of and considered the evidence, and we cannot find that she was foreclosed from crediting the testimony of respondent and his wife. See Administrator v. Smith, 5 NTSB 1560 (1986). The law judge's disposition reflects we think not so much any shortcoming in the Administrator's evidence but rather the strength of respondent's defense against the charges.

Our reversal of the conclusion that respondent had been adequately shown to have exercised control over the flights at issue leaves unresolved an objection to the law judge's decision that our prior disposition did not reach; namely, whether respondent had in March 1987 intentionally falsified a load manifest for a passenger-carrying flight, by listing himself as pilot in command despite not being aboard the aircraft, after he destroyed (or caused to be destroyed) the original load manifest

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<sup>8</sup>These records include BEA invoices urging that payment be remitted to BEA and bearing the following notation "THANK YOU, For flying with Buffalo Express Airline, Inc. We look forward to serving you in the future."

for the flight.<sup>9</sup> The law judge, during the May, 1989 hearing, did not allow the Administrator to develop evidence on this allegation because it was made in support of a criminal charge under Section 902(e) of the Federal Aviation Act. Although the Administrator did not appeal from the law judge's dismissal, on respondent's motion, of that charge as beyond the Board's jurisdiction to review, the Administrator contends that evidence concerning the matter of the manifests nevertheless should have been allowed because it was relevant to the allegation in the complaint that respondent lacked the good moral character required to be an airline transport pilot (ATP) certificate holder.<sup>10</sup> We agree with the Administrator, as we previously suggested, see Order EA-3349 at 4, note 5, that the law judge erred in excluding this evidence. It was obviously relevant to

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<sup>9</sup>The complaint also alleged that respondent operated aircraft or served as a crewmember in Part 135 service without the oral or written test, competency flight test, aircraft line check, or appropriate training. The law judge did not discuss these allegations but reversed the Administrator's order in its entirety. The Administrator did not pursue these claimed infractions on appeal, and we have treated them as having been abandoned. NTSB Order EA-3349, supra, fn. 3.

<sup>10</sup>On appeal to the Board the Administrator broadened the rationale for his objection, arguing that evidence on respondent's handling of the manifests was also relevant to the operational control issue. Given the law judge's rejection of all the evidence the Administrator was permitted to introduce on that issue, largely on credibility grounds, it is extremely doubtful that the law judge would have decided the control issue any differently had this point been argued to her and had evidence concerning the manifests been allowed and considered. Moreover, we do not believe that evidence tending to establish the destruction-falsification allegations would provide such additional support for the Board's prior judgment in the case as would convince the Court that the control issue had been adequately analyzed and explained.

the good moral character issue. We do not agree, however, that a remand for the taking of evidence on the matter is warranted.

The law judge who heard this case five years ago has since retired, and, even if she were available, the allegations concerning the good moral character issue do not require for their proper disposition any particular familiarity with the evidence compiled with respect to the other issues in the case.<sup>11</sup>

In these circumstances, we are not persuaded that the case should be remanded the case for further proceedings on the existing record. We will, therefore, dismiss the good moral character allegations without prejudice to the Administrator's right to refile them in a new order should he deem such action advisable in light of whatever considerations may now be germane to that determination.

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<sup>11</sup>The Administrator has, of course, been free within that period to pursue in Federal court a criminal prosecution of respondent on the Section 902(e) charge the law judge dismissed.

A guilty verdict in that forum could then have served as a predicate for revoking respondent's ATP certificate on the good moral character ground, with right of appeal to the Board.



ACCORDINGLY, IT IS ORDERED THAT:

1. Board Orders EA-3349 and EA-3451 are vacated to the extent they sustained violations of FAR sections 135.3 and 135.5, and

2. The Administrator's order of revocation is, consistent with this opinion and order and the law judge's initial decision, reversed.

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.